IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5155 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 No

RAKESH KALIYA

Versus

RANJITRAI HARGOVANDAS RATHOD

Appearance:

MR SS BELSARE for Petitioner

MR SUNIL C PATEL for Respondent No.1

MR AJ DESAI ASSTT PUBLIC PROSECUTOR for Resp. No. 2

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 20/10/2000

C.A.V. JUDGEMENT

(Per : D.H.Waghela, J.)

1. This petition under Section 482 of the Code of

Criminal Procedure prays for quashing of the complaint in Criminal Case No.10308 of 1992 filed by the opponent No.1 (original complainant) pending in the Court of the learned Chief Judicial Magistrate, Navsari.

2. The relevant facts are that the complainant was running an industry manufacturing petroleum products and the applicant-accused, the managing director of a company based in New Delhi, produced nitrogen gas generator plant which the complainant needed to instal in their factory in the year 1990. According to the complainant, with a view to extracting a large amount, the applicant had assured the complainant about the quality and capacity of the plant and booked order against which advance payment was made. Thereafter, the plant was installed by the applicant after some delay and additional payment, but the plant could not generate nitrogen with the purity of 99.5% to 99.9% as promised. Therefore, being aggrieved by the full advance payment that was required to be made and further by the non-performance of the plant as per the promise, the complainant asked the applicant to take away the plant and refund the price with damages. However, as the applicant refused to repay the amount, the complainant is stated to have had reasons to believe that the applicant had committed breach of trust and cheating punishable under Sections 406 and 420 of the Indian Penal Code and, accordingly, a complaint was filed for punishing the accused after issuing warrants for the arrest of the applicant.

2.1 In his statement on oath before the learned Chief Judicial Magistrate, the complainant has reiterated that by installing an inefficient plant not meeting with the requirements of the complainant and by not refunding the amount, the applicant had committed criminal breach of trust and cheating. On the basis of the complaint and the statement on oath thereunder, the learned Chief Judicial Magistrate took cognizance and ordered issue of summons.

3. The applicant has produced with the present application the service reports of their company; the terms and conditions of the sale agreement among the parties and the rojnama of the trial Court in the criminal case. The applicant had made an application in the trial Court for exemption and the same having been allowed, the applicant was granted exemption from personal appearance till further orders. However, thereafter, an application for non-bailable warrant and arrest was made by the complainant on the ground that the non-bailable warrant issued against the accused

(applicant) had not returned after or without being served. The trial Court had then issued non-bailable warrant as prayed. Thus, the applicant was arrested at Delhi even though he was granted exemption. On these facts, the learned counsel for the applicant vehemently argued that the original complaint and the proceedings in the criminal case are ex facie an abuse of the process of the Court in a dispute of purely civil nature.

4. The opponent- the original complainant, has not filed any affidavit-in-reply. The learned counsel for the applicant pointed out that pursuant to and in terms of the conditions of the agreement among the parties, the plant in question was delivered to the complainant at their address and, according to the service reports dated 30.9.1991 and 2.10.1991, which are annexed with the petition, the engineers of the applicant had visited the site of the opponent for commissioning the plant and the said reports were signed on behalf of the opponent in token of the work having been satisfactorily carried out. According to the original despatch instructions and the terms and conditions of sale, which are annexed with the petition, the plant was despatched on 26.7.1991 and the balance payment was stipulated to be made against despatch documents through bank. Another condition regarding warranty was to the effect that the equipment was warranted for workmanship and performance for a period of 12 months from the date of commissioning or 18 months from despatch, whichever was earlier. After such period of 18 months and 12 months from the date of despatch and commissioning respectively, the first notice dated 23.10.1992 was issued by the opponent contending, inter alia, that the intention of the applicant was questionable and requesting to commission the plant failing which legal remedies would be resorted to. A copy of the notice dated 23.10.1992 is annexed with the petition. The learned counsel for the applicant submitted that even for a dispute of civil nature in respect of quality or performance of the plant in question, the notice alleging only questionable intention was issued by the opponent after the contractual period of warranty had since long expired, and till then no allegation was made. Reading the complaint in light of these facts, which are not disputed by the opponent, it is contended that the complaint is clearly not bona fide, but calculated to take revenge against the opponent by abusing the process, and it is not disclosing the essential ingredients of the offences alleged against the applicant.

5. The learned counsel for the petitioner relied

upon the following observations in STATE OF HARYANA v. BHAJAN LAL [1992 Supp.(1) 335]:

" The following categories of cases can be stated by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482 of the Cr.P.C. can be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prma facie constitute any offence or make out a case against the accused.

(2) .....
(3) .....
(4) .....
(5) where the allegations made in the first information report or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) .....
(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

5.1 The following observations of the Supreme Court in PUNJAB NATIONAL BANK v. SURENDRA PRASAD SINHA [AIR 1992 SC 1815] are also relied upon:

"Judicial process should not be an instrument of oppression or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complainant as vendetta to

harass the persons needlessly."

5.2 The observations made by the Apex Court in TRILOK SINGH v. SATYA DEO TRIPATHI [AIR 1979 SC 850] are also relied upon to submit that the criminal proceeding initiated as regards the dispute which was purely of a civil nature was an abuse of process of the Court and the same deserves to be quashed and set aside by the High Court by exercising its inherent power under Section 482 of the Cr.P.C.

5.3 The principles laid down by the Apex Court in MADHAVRAO JIWAJI RAO SCINDIA v. SIMBHAJIRAO CHANDROJIRAO ANGRE [AIR 1988 SC 709] are relied upon to submit that the Court has to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit prosecution to continue as the Court cannot be utilised for any oblique purpose where chances of an ultimate conviction are bleak and no useful purpose is likely to be served by allowing a criminal prosecution to continue and that the proceedings could be quashed even though it may be at a preliminary stage.

6. The learned counsel for the opponents submitted that the averments in the complaint, prima facie, made out a case for trial and this Court ought not to quash the complaint merely because one or two ingredients of the offence have not been stated in detail in the complaint. It is further submitted that quashing of complaint on the ground of disclosure of a commercial or monetary transaction would not be justified as the complainant was obviously cheated by the supply of a plant which did not perform as promised. Relying upon the judgment of the Supreme Court in MEDCHL CHEMICALS & PHARMA PVT. LTD. v. BIOLOGICAL E. LTD. [2000 (2) Supreme 261], it was submitted that whatever appeared on the face of the complaint should be taken into consideration without any critical examination of the same. And that both criminal law and civil law remedies are not mutually exclusive but clearly co-extensive and essentially differ in their content and consequence. Relying upon the observations in RAJESH BAJAJ v. STATE NCT OF DELHI [AIR 1999 SC 1216], it was submitted that a complainant need not verbatim reproduce in the body of the complaint all the ingredients of the offence alleged against the accused. If factual foundation for the offence was alleged in the complaint, the Court should not hasten to quash the criminal proceedings merely on the premise that one or two ingredients were not stated with details. The Supreme Court has in the said judgment

emphasised the importance of the intention of the person who induced the victim of his representation as the decisive factor for discerning whether there was commission of any offence. Relying upon the observations of the Supreme Court in HARERAM SATPATHY v. TIKARAM AGARWALA [AIR 1978 SC 1568], it was submitted that the revisional jurisdiction of the High Court cannot be extended to launch a detailed and meticulous examination of the case on merits and to set aside the order of Magistrate directing issue of process. Relying upon the judgment in K.M. MATHEW v. STATE OF KERALA [AIR 1992 SC 2206], it was submitted that it is open for the accused to approach the Magistrate with an appropriate application to drop the proceedings if the complaint did not disclose any offence on the very face of it. It was further submitted, relying upon the observations in STATE OF BIHAR v. P.P.SHARMA [AIR 1991 SC 1260], that the annexures to a writ petition challenging criminal proceedings against accused cannot be relied upon to put an end to the process of trial provided under the law.

7. Before deciding the issues arising in the present proceedings, it may be pertinent to refer to one more judgment of the Apex Court in ITC LTD. v. DEBT RECOVERY APPELLATE TRIBUNAL [(1998) 2 SCC 70] in which it is observed that "clever drafting creating illusions of cause of action are not permitted in law".

8. In the facts of the present case, it is obvious that the complaint has arisen from the alleged non-performance of the plant installed by the applicant after a considerably long period of time. The notice of the complainant issued in that regard does not contain any allegation which forms the basis of the complaint. Thus, the complaint is so drafted that, for the first time, it alleged some ingredients of the offences with which the applicant was sought to be charged. However, in his statement on oath recorded below the complaint, the complainant has clearly stated that by not installing and commissioning the plant according to their requirement and by refusing to refund the amount paid to him, the applicant had committed breach of trust and cheating. The complaint is made long after the contractual obligations of the parties were fulfilled and fault or breach of any condition, if any, was not immediately voiced.

9. The offence of criminal breach of trust under Section 405 of the I.P.C. primarily involves entrustment of property and dishonest misappropriation or conversion

or disposal of such property in violation of any direction of law or legal contract relating thereto. And the offence of cheating under Section 415 of the I.P.C. requires fraudulent or dishonest inducement to deceive a person into delivering any property or into doing or omitting to do something which he would not do or do if he were not so deceived. The word "Dishonestly" is defined in Section 24 of the I.P.C. as: "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly". And "Fraudulently" is defined in Sec. 25 of I.P.C. as: "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The word 'deceive' in its ordinary dictionary meaning means "to cause someone to believe something which is not true".

10. In the facts of this case, neither the complaint nor the statement of the complainant on oath contains an allegation to the effect that from the very beginning, the intention of the applicant was to deceive and dishonestly or fraudulently extract money without ever meaning to instal a plant which would not perform as promised. The complainant waited for over a year after payments and installations before filing the complaint in which except the bald allegation of breach of trust and cheating, hardly any details about deceit or fraudulent or dishonest inducements are found. Thus, even disregarding the uncontroverted documentary evidence produced with the petition, the complaint and the statement of the complainant on oath do not make out a prima facie case against the applicant, and the allegations are so absurd that sufficient ground to proceed against the accused are not established. And the prosecution is obviously instituted with the malicious ulterior motive of having the applicant arrested and harassed. The opponent attempted it and achieved it in his second attempt by misleading the Court as seen earlier.

11. Under the circumstances discussed as above, the prosecution bears an unmistakable stamp of being by way of an abuse of the process of Court. There is no allegation of entrustment of property which was misappropriated or converted in violation of any direction of law or any express or implied condition of contract. Similarly, there is no allegation of any dishonesty in inducing the complainant in the matter of placing an order for the plant which may amount to

cheating under Section 415 of the I.P.C. Thus, even if the allegations made in the complaint and the statement of the complainant are taken at their face value, the offences under Section 406 or Section 420 of the I.P.C. are not made out. In this view of the matter, the impugned order of the learned Magistrate taking cognizance of the offences and issuing the process against the accused cannot be sustained. It would also be futile to allow continuance of the criminal proceedings pursuant to the complaint of the complainant.

12. In the result, the petition is allowed and the complaint and the proceedings in Criminal Case No.10308 of 1992 pending before the learned Chief Judicial Magistrate, Navsari, are quashed. Rule is made absolute with no order as to costs.

Sd/-

(D.H.Waghela, J.)

KMG Thilake

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